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June 7, 2004

Lawrence H. Norton, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: MUR 5440 – Sierra Club ((c)(4) and 527 entities))

Dear Mr. Norton:

This letter constitutes the response of the Sierra Club[1] to the complaint filed by the Republican National Committee and Bush-Cheney '04, Inc. in Matter Under Review 5440.

Complainants falsely allege that Sierra Club is illegally using soft money to influence a federal election and coordinating its activities with Kerry for President. The Complaint provides no factual support for these allegations. Moreover, the legal analysis upon which Complainants rely was rejected by the Federal Election Commission during its consideration of the Notice of Proposed Rulemaking on Political Committee Status. For these, and the reasons more specifically presented below, we respectfully request that the Commission find no reason to believe that the Sierra Club violated the Federal Election Campaign Act, as amended (the "FECA"), and dismiss this complaint with no further action.

[1] It is unclear which Sierra Club entity is named in the Complaint and is designated as a potential respondent. The Sierra Club is a corporation exempt from tax under Internal Revenue Code ("IRC") section 501(c)(4) and has established separate segregated funds exempt from tax under IRC section 527 as required under tax and federal election law to conduct certain activities as more fully explained in the response. These SSF's are not separate corporate entities and, therefore, this letter constitutes the response for all Sierra Club "entities."

The Complaint Alleges No Facts Demonstrating that the Sierra Club is Illegally Using Soft Money to Influence a Federal Election

While the complaint relies exclusively on an internal memorandum prepared by Carl Pope, the Executive Director of the Sierra Club, to allege that the Club's overriding purpose in 2004 is to defeat President Bush, the memorandum says no such thing. As the title indicates, the memorandum discusses two distinct Sierra Club campaigns: (1) a "Stop Bush" campaign, the sole purpose of which is to block the passage or implementation of anti-environmental policies supported by Congress and the Bush Administration and (2) a "Beat Bush" campaign to defeat President Bush in the November elections.

Contrary to Complainants' claims, there are many distinct programs and entities that make up what is referred to as the "Sierra Club" and Mr. Pope makes specific reference to them in his memorandum.[2] Not only does Mr. Pope refer to these various programs and entities, he discusses their distinct purposes. In light of the internal audience of Club staff and volunteers that received this memorandum, it is not surprising that he did not describe in detail the applicable legal distinctions and parameters of each entity. The recipients of the memorandum are trained, and compliance staff are in place to oversee their work, to ensure that the Club's specific programs and communications are paid for and conducted through the appropriate legal entity.

The "Stop Bush" campaign relates entirely to the Club's legislative and public policy programs and cannot serve as the basis for any complaint under FECA. To the extent that the memorandum discusses the "Beat Bush" campaign, it refers to the political activities that are entirely lawful when conducted through the Sierra Club's various entities as specifically discussed below. Thus, there is no basis for finding that the Sierra Club's corporate entity or its Environmental Voter Education Campaign segregated fund are political committees under the Act.

1. Sierra Club has the necessary legal entities to conduct the activities outlined in the memorandum in a manner that fully complies with the Internal Revenue Code and the Federal Election Campaign Act.[3]

The memorandum first discusses the public education and mobilization activities to lobby and "head off the assault in Congress and to hold elected officials and President Bush accountable before and after votes and administrative programs that attack environmental programs." These programs are largely conducted through the Sierra

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[2] The complaint incorrectly states that the "PAC is not mentioned in the memorandum nor does the memorandum make any distinction between the various components parts of the Sierra Club." *See* Complaint at 63, footnote 119.)

[3] The IRS provides guidance on operating and managing multiple tax entities with distinct exempt purposes in its Continuing Professional Education Text. *See, e.g.*, "Election Year Issues," by Judith E. Kindell and John Francis Reilly, *IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for Fiscal Year 2001* at 473. In addition, through various rulings, the Service has provided guidance on the activities that may be conducted by these entities particularly with the purpose of distinguishing partisan political and nonpartisan activities.

Club, which is exempt from tax under IRC section 501(c)(4). As such, it is permitted to lobby and attempt to influence Congress and the Administration to support or oppose legislation and other policy initiatives that affect the environment. For the last three years, the Sierra Club has opposed anti-environmental initiatives through lobbying Congress and the Bush Administration, litigation and activation of its field program to educate the public about these harmful policies. While not specifically mentioned in the memorandum, the Sierra Club is also permitted to expend funds to communicate with its membership on any subject including expressly advocating the election or defeat of a federal candidate.[4]

Mr. Pope then refers specifically to Sierra Club's Environmental Voter Education Campaign (EVEC), described as a "*separate* voter education effort." (emphasis added) First established in 1996, EVEC is a separate segregated fund that is registered with and reports to the IRS pursuant to IRC sections 527(i) and (j) for the following purposes:

> To educate people about public officials' environmental records, voting records and positions of candidates for election to Congress, the presidency and state and local officials. Based on this information, the public can make judgments about the environmental positions and qualifications of their elected officials and candidates during an election season.

Statement of Purpose, Sierra Club Voter Education Fund, IRS Form 8871, submitted July 24, 2003 (Attachment P).

Through a variety of approaches including grassroots lobbying and preparation of voter guides, it seeks to encourage the public to better understand environmental issues and candidates' records on those issues. In addition, the Sierra Club through its EVEC program encourages the public to vote. The public communications used in these activities have not and will not include express advocacy of the election or defeat of any federal candidate.

Finally, the memorandum describes the Sierra Club's federally registered political committee, Sierra Club Political Committee (SCPC) through which it expressly advocates the election or defeat of federal candidates. Express advocacy activities to the general public, including those to defeat President Bush and advocate the election of Senator John Kerry, are conducted through this committee. Nothing in Mr. Pope's memorandum suggests that the Sierra Club would conduct its express advocacy activities to defeat Bush in any other manner.

[4] Thus, Sierra Club is permitted, as expressly provided under the FECA, to conduct some aspects of its "Beat Bush" campaign through communications paid for by the IRC section 501(c)(4) organization and sent to members. This provision of the law is entirely ignored by Complainant.

2. Complainants' Allegation that the Sierra Club's Major Purpose is to Influence a Federal Election is Patently False

While Complainants' suggestion that the memorandum "calls into question" the Sierra Club's tax-exempt status is beyond the jurisdiction of the Federal Election Commission, such an assertion entirely disregards the myriad of Club educational, chapter, outings and books programs that have no relationship whatsoever to federal elections or even federal policy. Not only does the Complaint demonstrate a fundamental misunderstanding of the standard applied by the IRS in determining "primary" (not major) purpose, it entirely disregards the totality of Sierra Club's extensive programs that have no political purpose. For example, the 2004 budget of the Sierra Club is approximately $80 million. The entire conservation program budget for 2004, which includes all of Sierra Club's nonpartisan advocacy on federal policy and legislation in addition to local environmental protection efforts, is only approximately $30 million. The amount that the Sierra Club estimates it will spend in all of 2004 on express advocacy membership communications will be a small fraction (less than 2%) of the organization's budget. Therefore, any suggestion that the major purpose of the Sierra Club is "influencing a federal election" is clearly mistaken.

3. There is No Basis to Support Complainants' Allegation that EVEC must Register as a Federal Political Committee

Complainants are similarly incorrect to the extent that they argue that merely because EVEC is a political organization exempt from tax under IRS Section 527 it is required to register as a federal political committee with the Commission and comply with the prohibitions and limitations of the FECA. Complaint at 63. As its purpose statement demonstrates, EVEC was organized to educate the public about elected officials and candidates' records and where they stand on the environmental issues. EVEC does not engage in express advocacy communications. It does not make "contributions" or "expenditures" as defined under the FECA.

Despite Complainants' contentions, nothing in the Bipartisan Campaign Reform Act or the Supreme Court's decision in *McConnell v. FEC,* 124 St. Ct. 619 (2003), changes the current rules governing the requirements for section 527 organizations to register and report with the Federal Election Commission. As the Supreme Court recognized in *McConnell*, under the BCRA "[i]nterest groups...remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising (other than electioneering communications)." *Id.* at 686. Congress decided to stop short of applying its soft money rules, applicable to the political parties, to independent interest groups. While the Court in *McConnell* may have opened the way to expand the reach of the FECA beyond the current "express advocacy" standard, that step has not been taken by Congress or this Commission.

Moreover, this Commission recently declined to issue new regulations expanding the requirements for registration and reporting under the Act or to revise the definitions of "political committee," "expenditure" or "contribution." In support of deferring any

decision to amend the current regulations, the Office of the General Counsel recognized the complexity of the proposed rulemaking and the need for "appropriate study" in order to craft regulations that would not be overly broad and vague. The Commission followed the General Counsel's recommendation acknowledging the critical Constitutional questions raised by any change in the application of the requirements to register and report under the FECA. Particularly in light of this decision, the Commission may not take this opportunity to develop and apply new legal standards.

Even the Republican National Committee has recently conceded that without further action, current law does not dictate that all 527 organizations that "promote, support, attack or oppose" federal candidates must register and report with the Commission. Indeed, immediately after the Commission voted to defer action on the NPRM, Complainants issued a press statement acknowledging that 527 organizations may engage in such communications without falling within the registration requirements of the Act.

Finally, if Complainants are suggesting that one memorandum issued by staff of an organization could possibly define and determine the major purpose of an entity, that allegation is equally specious. Possibly the most controversial provision of the recent NPRM was the proposal to rely on an organization's "public pronouncements and other communications" to determine its major purpose. *See* Proposed Regulation § 100.5(a)(2)(i), Notice of Proposed Rulemaking, 69 Fed. Reg. 11736 (March 11, 2004). This standard that would permit highly subjective judgments regarding the relative importance of various documents was never adopted by the Commission and has no application here.

The Complaint Alleges No Facts Demonstrating that the Sierra Club has Made Illegal Coordinated Expenditures

The Complaint alleges that Mr. Pope's "position in the soft money scheme supporting John Kerry" results in the coordination of expenditures by the Sierra Club on behalf of the Kerry campaign. It fails to demonstrate, however, that Sierra Club has made any expenditure for communications that would fall within the content standards or identify any communications whatsoever that were allegedly coordinated.

Moreover, there is no factual support for finding reason to believe that the Sierra Club violated the conduct standard provided in the regulations. The complaint falsely alleges that Mr. Pope learned of strategies and plans of the Kerry Committee through Jim Jordan and America Coming Together and used this information to organize and direct Sierra Club's activities. There is no evidence to suggest that Mr. Jordan or ACT has information regarding the Kerry campaign, and there is similarly no evidence that Mr. Pope derived such information, even if it were available, from either of these sources. Furthermore, Mr. Pope denies that he has learned any information from ACT or Mr. Jordan about the Kerry campaign's strategies or plans and that he conveyed to the Sierra Club or used any such information when organizing or directing Sierra Club expenditures. *See* 11 C.F.R. § 109.21(d)(3).

The complaint fails to state any credible claim that the Sierra Club created, produced or distributed any communication at the request or suggestion of a candidate, authorized candidate committee, political party committee or agent thereof. *See* 11 C.F.R. § 109.21(d)(1)(i). It also fails to provide any evidence that Sierra Club created, produced or distributed any communication with the assent of any candidate, authorized candidate committee, political party committee or agent thereof. *See* 11 C.F.R. § 109.21(d)(1)(ii). Finally the complaint fails to allege any facts to demonstrate that any candidate, authorized candidate committee, political party committee or agent thereof was materially involved in the dissemination of a Sierra Club communication or that there was any substantial discussion between Sierra Club and any prohibited person or entity. *See* 11 C.F.R. § 109.21(d)(2)-(3).

In the event that Complainants intend, without specifically stating this to be the case, to rely on the "former employee" rules, they are not applicable here. This rule applies only to an individual who is working for the third party that pays for the communication. 11 C.F.R. §109.21(d)(5)(i). Mr. Jordan does not work for the Sierra Club and, therefore, this regulation has no bearing in these circumstances.

Based on this response, we request that the Commission dismiss this complaint with no further action.

Very truly yours,

B. Holly Schadler
Counsel to Sierra Club